Mark I Tune-Up Centers, Inc. *and* Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, District 9, International Association of Machinists and Aerospace Workers, AFL-CIO, Jointly. Cases 14-CA-12530 and 14-RC-8873

June 24, 1981

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On July 21, 1980, Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting memorandum.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mark I Tune-Up Centers, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election in Case 14-RC-8873, held on April 13, 1979, be, and it hereby is, set aside, and that case is hereby remanded to the Regional Director for Region 14 for the purpose of scheduling and conducting a second

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's finding that the Respondent engaged in objectionable conduct, we note that he inadvertently included in his listing of those violations of Sec. 8(a)(1) upon which he relied, *a fortiori*, in setting the election aside, two violations occurring after the election: the Respondent's discharges of Spiess and Protte.

[2] In adopting the Administrative Law Judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Robert Spiess, we do not rely on the Administrative Law Judge's statement that Spiess' union activities were the "predominant reason for his discharge." We have instead analyzed the record in light of the evidentiary test set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), issued subsequent to the Administrative Law Judge's Decision. Employing that test, we find that the General Counsel made a *prima facie* showing that Spiess' union activity was a motivating factor in the Respondent's decision to discharge Spiess. The Respondent's own witness, Manager Don Shaeffer, admitted knowledge of Spiess' union activity. In addition, the Respondent's animus toward the Union in general and Spiess' union activity in particular is amply demonstrated by the record herein. On election day, prior to Spiess' casting of his ballot, Spiess was one of the three employees who the Administrative Law Judge and we have found were the object of threats made by Shaeffer. Shaeffer at that time told Spiess and two other employees that he was not a fan of unions because 3 years earlier his parents' lives had been threatened by the Union, and that if the Union won he could no longer be a "nice guy" but "could be extremely stern and go completely by the books." He also repeated a threat made earlier at a series of six preelection speeches that should the Union win the employees would lose their current shop privileges (permission to use the Respondent's shop and tools to repair their own cars and to buy parts at cost). Also, we have adopted the Administrative Law Judge's finding that the Respondent unlawfully granted Spiess a $30 unscheduled and unearned bonus on March 9.

The Respondent, in rebuttal of the General Counsel's *prima facie* case, contends that it discharged Spiess, despite what it concedes to be Spiess' superior skill as a mechanic, because of his poor attitude toward his supervisors and fellow employees, and for specific incidents listed in the document presented to him at his April 23 discharge. We adopt the Administrative Law Judge's finding that, although the credited evidence shows Spiess was "far less than an ideal employee" (he admitted both that he took an unauthorized day of sick leave on March 20 and that he was often late), all of the alleged incidents of misconduct were either ignored or condoned by the Respondent, which failed to discipline Spiess at all prior to his April 23 discharge. Indeed, as the Administrative Law Judge found, Spiess had been promoted to second-shift supervisor in 1978, and on March 9, 1979, he was given the above-mentioned bonus, allegedly for additional and more difficult work. Nothing in the credited evidence shows that his attitude or work habits had changed significantly in the period preceding his discharge. As the Administrative Law Judge noted, the only visible change was Spiess' union activity. Under these circumstances, we find that the Respondent has failed to rebut the General Counsel's *prima facie* case of discriminating antiunion motivation or to prove that it would have discharged Spiess in the absence of such unlawful motivation. We therefore conclude, in agreement with the Administrative Law Judge, that the Respondent violated Sec. 8(a)(3) and (1) by discharging Spiess.

[3] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

election at such time as he deems that circumstances permit a free choice on the issue of representation.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

DECISION

STATEMENT OF THE CASE

DAVID P. MCDONALD, Administrative Law Judge: This case was heard before me at St. Louis, Missouri, on June 4 and 5, 1979,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 14, on May 10, with an amendment to the complaint on May 11. In addition, on May 14, the Regional Director ordered consolidated certain issues arising from a representation election in Cases 14-RC-8873 and 14-CA-12530. The complaint, based on charges filed on April 23, 26, and 27 and May 9, jointly by Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters Union, and District 9, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called Machinists Union, alleges that Mark I Tune-Up Centers, Inc., herein called Respondent, engaged in violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Pursuant to a petition, a Stipulation for Certification Upon Consent Election was executed by Respondent and the Unions and approved by the Regional Director on March 27, 1979. An election was conducted by secret ballot on April 13 and 16, among the employees in the following unit:

> All employees employed at the Employer's facilities at 11018 Page Avenue, 8426 Manchester Avenue, 8502 Manchester Avenue, 10607 Concord Village, 10825 Old Halls Ferry Road, 1250 Old Orchard Center, St. Louis, Missouri; 1355 South 5th Street, St. Charles, Missouri, and 10505 Lincoln Trail, Fairview Heights, Illinois, EXCLUDING all office clerical and professional employees, guards and supervisors as defined in the Act.

An official tally of ballots was served on the parties at the conclusion of the election, setting forth the following: Of 16 valid votes counted, there were 3 for, and 13 against, the Union. Challenges were not sufficient in number to affect the results of the election.

The Union filed joint objections to the election based on conduct engaged in by Respondent. On May 14, after investigating the objections, the Regional Director issued his Report on Objections and Recommendation and notice of hearing, which ordered a hearing to resolve substantial and material questions of fact relating to Respondent's conduct as raised by Objections 1, 2, 3, 5, 7, and "other Acts and Conduct" as to Parts A and B.

The primary issues are whether Respondent: (1) violated Section 8(a)(1) and (3) of the Act; (2) engaged in conduct which prevented a fair election; and (3) whether the election should be set aside.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed on behalf of the General Counsel and Respondent.

Upon the entire[2] record of the case, the briefs, the arguments made by the parties at hearing, and my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a Missouri corporation with an office and place of business in St. Louis, where it is engaged in the retail business of automotive repairs, that during the 12-month period ending March 26, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and purchased and caused to be transported and delivered at its Missouri facilities automotive parts and other goods and materials valued in excess of $50,000 of which goods and materials valued in excess of $50,000 were transported and delivered to its Missouri facilities directly from points located outside the State of Missouri. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The Teamsters Union and the Machinists Union are labor organizations within the meaning of Section 2(5) of the Act.

III. REPRESENTATION PROCEEDINGS AND THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Two related, but separate, matters are involved in this proceeding. The first is concerned with the validity of objections filed jointly, by the Teamsters Union and the Machinists Union, regarding Respondent's conduct affecting the results of the representation election which was held on April 13 and 16. The second facet of this case deals with a series of events occurring within 3 months preceding the election and two discharges after the election. The complaint alleges that Respondent has committed a series of unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Respondent is a privately held corporation, founded in December 1971, with only seven stockholders holding the majority of the stock. Approximately 15 additional minority stockholders are comprised of employees who exercised their options to buy shares. Included in the group was James Hanner with 2,200 shares, George

[1] All dates herein refer to 1979 unless otherwise indicated.

[2] Errors in the transcript have been noted and corrected.

Brier with 12,000 shares, David Protte with 400 shares, and Rick Daugherty with a few hundred shares. Gary Lowry serves as corporate president.

Respondent introduced a bonus or incentive plan for its employees in January 1978. It was based on the amount of parts and labor sold over and above the basic job, such as tuneup or brake work. The mechanics' annualized monthly salary was established by multiplying his hourly rate by 40 hours, by 52 weeks, and dividing by 12 months. The resulting quotient was then doubled and this final sum represented the annualized monthly salary (AMS). If a mechanic sold parts and labor to equal or exceed the AMS, then he was entitled to a bonus of 5 percent of the excess. A penalty of 7 percent was imposed on returns or dissatisfied customers.

On January 30, Respondent's board of directors discussed the employees' wage and bonus structure. Several individual employees and managers had complained that the then-current bonus and wage schedules were unfair. One director suggested that Lowry set up a meeting to explore the feelings and attitudes of the individual employees concerning bonus and wage questions. On the following day, Lowry notified his employees that he intended to hold a meeting on February 14, with all employees except managers, for the purpose of discussing wages and bonuses and to receive suggestions or criticism concerning their employment. Although 90 percent of the discussion centered around wages, some complaints were expressed concerning the cost of work uniforms. Under the existing system the Company paid 25 percent for the uniform during the first year, 50 percent the second year, 75 percent the third year, and the full amount beginning the fourth year. Since the men were required to wear the uniforms, they felt the expense should be paid by the Employer.

At the January 30 meeting, the board of directors also discussed the possibility of closing the Fairview Heights store for economic reasons. At their December meeting they had decided to close the store based on the original budget and projections for fiscal 1979. However, due to revisions in the budget it was decided to postpone the closing and monitor the store on a month-to-month basis.[3]

[3] The 41st meeting of the board of directors of Mark I Tune-up Centers, Inc., was held on January 30, 1979, at 3:30 p.m. at the corporate offices, 8502 Manchester Road, Brentwood, Missouri. The following members of the Board were present: G. Lowry, A. Miller, D. Neville, A. O'Brien, E. Bock, and J. Tully. Preston Estep was absent. The following topics were discussed:

Item 1. The budget and projected sales for 1979 were reviewed and approved as presented. In conjunction with this, it was agreed that the Fairview Heights center not be closed as originally decided at the last meeting, but rather be kept open for the time being, with periodic reviews of its progress.

Item 6. Gary Lowry brought up the subject of the employees' bonus plan and the many complaints he has been receiving about it. A bonus plan of some type has been in effect for the past 2 years and has increased our average ticket by about $3. He asked for suggestions on other types of incentive plans to use to motivate mechanics and increase productivity. Doug Neville suggested that Gary have a meeting with all the mechanics and ask them their thoughts about the present plan and their suggestions for changing it. A few of the directors would try to attend.

Item 7. A schedule of directors' meetings for the ensuing year was established as follows: March 21, May 16, July 18, September 19, and December 19. All meetings will start at 3:30 p.m. and will be held at the corporate offices, 8502 Manchester Road., unless notified otherwise.

1. Initial union meeting

George Brier and Richard Daugherty, Respondent's employees, met with Donald Schwartz and Chuck Merrill of Local 618 of the Teamsters Union. Schwartz was an organizer for Joint Council 13 of the Teamsters. The meeting was held at a Ramada Inn on February 27. The purpose of the meeting was to explore the advantages and benefits of union representation and what was involved in starting a union. Later that day and on the following day, Brier spoke to several of his fellow employees to ascertain whether there existed sufficient interest to justify an effort to organize a union.

2. Second union meeting—March 1, 1979

Again Brier and Daugherty met with Schwartz and explored the exact procedure for founding a union. Schwartz explained that the first step is to acquire the signatures of a majority of the mechanics on union authorization cards, which would designate the Teamsters Union as the collective-bargaining representative. Schwartz testified that:

> . . . we told the people what they had to do to organize and what the repercussions would be, what retaliations the company usually proceed with, say you are a bunch of gangsters or a bunch of crooks and all the things of this nature which was brought out here early today, which is not true. And pressure would be put on them. They would probably be given increases in wages and so on and so forth but next year you are back in the same boat if you don't organize.

Brier read the authorization card, filled in the information, signed and handed it back to Schwartz. Then Daugherty signed and returned the card. The two men proceeded to the Page facility where they spoke to Dan Landolt, Mike Herbert, Bob Spiess, Dave Protte, and Jim Saia. After these men read the cards they completed, signed, and returned them to Brier who placed them in the mail. They then drove to the South County store where the procedure was repeated and James Hanner, Bob Hering, Dennis Tochette, and Brian Schrama signed. In the days that followed several other employees signed the cards.

Within a few days, 16 signed authorization cards were received by the Teamsters Union, Local 618. On March 6, 1979, Schwartz sent to Gary Lowry a demand for union recognition by Teamsters Local 618. The letter simply stated that the Union currently represented a substantial majority of the Mark I mechanics at the Page store and requested a meeting for the purpose of beginning contract negotiations.

3. Third union meeting—March 7, 1979

The third meeting was held at the Teamsters union hall and was attended by Brier, Daugherty, Protte, Her-

bert, Spiess, Landolt, and Zimmer. A representative of the Machinists Union, Local 777, was also present. At that time, Schwartz advised the men that it was in their best interest to be represented by both Unions and therefore he recommended they should also sign the Machinists authorization cards. He told them that both the Machinists and the Teamsters Union should represent them jointly. Dave Protte later testified:

> We were told that the Machinists Local 777 actually was a better union for us. They were representing most of the mechanic shops in the area. I believe they represented dealerships. That it would be the best for mechanics to go to 777, 618 would cover, like, warehousemen, the oil change and lube men, and the main thing was that we would benefit from 2 unions.

Without exception, the men who attended the March 7 meeting signed authorization cards for both Unions.

4. George Brier's discharge

George Brier was employed by Respondent in various capacities and locations from October 4, 1974, until the day of his discharge, March 26, 1979. Initially he worked at the Page store for approximately 1 year as a mechanic, until he was transferred to the North County store as manager. Then on November 6, 1978, he returned to the Page store as a mechanic.

On Wednesday, January 10, Brier stepped outside the garage to retrieve a customer's car. The parking lot was covered with ice. As he walked forward he slipped and fell to the ground. He reported the fall to the assistant manager. Two days later, he was seen by his physician, Dr. Ralph Barrale, who initially diagnosed his problem as a "low back condition," which he later referred to as a "lumbar sprain." On each visit Dr. Barrale provided a letter addressed "To whom It May Concern" and simply stated that Brier's recovery was slow and extended his return to a future date. At the time of the hearing, Brier was still unable to return to work. The letters indicated Dr. Barrale treated Brier on January 12, February 6, 17, and 28, March 16 and 27, and April 11. After the first visit, Brier called Lowry and informed him his doctor advised him to remain off work for 30 days. Brier quoted Lowry's response as: "Yes, that was fine, just keep him posted." Nothing was said during this conversation concerning his discharge or a definite day as to when he was required to return to work. Although Brier testified that he kept a copy and promptly forwarded each letter, Lowry stated he did not receive Dr. Barrale's letters dated March 16 or March 27. The letter of February 28 advised: "At this time Mr. Brier should be able to return to work on approximately March 19, 1979." Lowry testified that he relied on the February 28 letter and, therefore, when Brier failed to return to work on March 19, he informed him, by letter of March 26, that he was discharged.[4] Although Brier insisted he had mailed all of the medical reports, Lowry adamantly denied the receipt of the letters of March 16 and 27. These letters extended Brier's medical leave to April 2 and 16, respectively.

When Brier received the discharge letter on Tuesday, March 27, he testified that he called the corporate office of Mark I Tune-Up Centers and spoke to a receptionist, whom he believed to be Brenda. The woman who answered the telephone informed him that Lowry would not return to the office until April 2, the following Monday. When he called on Monday he was again informed that Lowry was not in the office. Although he claims he left a request for Lowry to call him he never received a return call.

Lowry denied ever receiving a call or message from Brier after March 26. The personnel at the corporate headquarters was limited to his secretary, Brenda Bayless, a warehouse manager, Bob Heinz, and a warehouse helper, Ken Trower. A search of the payroll records revealed that Brenda worked each day from March 27 to April 13. Therefore, if Brier spoke to a woman during this period it was Bayless. Bayless testified that she is familiar with Brier's voice and is absolutely certain he did not call the corporate office between March 27 and April 13. If the caller leaves a name she writes it down; however, these memos are not permanently maintained.

After his attempt to contact Lowry on March 27 and April 2, Brier admits he neither spoke to nor contacted anyone in management concerning his discharge until April 13, the day of the election. When he arrived at the Page facility he requested Don Schaeffer to look at his work release and explain to him why he was discharged. Brier alleges that Schaeffer said "that he was not the least bit interested in seeing them." Schaeffer denies that he was ever asked to examine the discharge letter. He recalled Brier entering the shop 10 to 15 minutes before the beginning of voting and stating, "Hi, Don, I am here to vote yes." Schaeffer replied, "Well, I don't know if you are eligible to vote or not. I heard that you had been terminated by the company for not coming back to work on time." Brier insisted that he had sent letters to Lowry which extended his sick leave beyond March 19. The conversation then turned to the pros and cons of union representation.

Brier had served Respondent as a manager for 3 years, until November 6, 1978. As manager, his understanding of company policy as to illness or injury was simply to keep the Company informed as to the status. If the medical problem was lengthy, a written doctor's statement was required. He cited the case of Richard Twardawski as an example of the Company's lax enforcement of its policy. Early in 1978, Twardawski injured his back. Two or three times his physician released him to return to work. Each time he would appear for work several days after the release date. He was not discharged until after the second or third time he failed to report for work.

[4] The March 26 discharge letter read:

> This letter is to notify you that you are discharged from Mark I Tune-up Centers, Inc. for not reporting to work on Monday, March 19, 1979. According to the most recent correspondence from your doctor, Ralph Barrale, you were able to return to work on Monday, March 19, 1979. We have received no further communication from you since that date. Your final pay check for 4 days vacation pay due you will be mailed shortly.

5. Board meeting—March 21, 1979

At the 42d meeting of the board of directors the progress of the Fairview Heights Center over the previous 7 months was discussed. The unit growth had decreased drastically each month since September 1978. Lowry voiced his opinion that the store should be closed, and this move was unanimously approved by the directors. Lowry was instructed to sell the center as an ongoing business.

Lowry gave a report concerning the meeting held on February 14, with their mechanics. The mechanics had voiced their displeasure with the current wage and bonus plan. Upon Lowry's recommendation the board of directors voted unanimously to convert the bonus plan to straight wages based on the individual mechanic's average hourly bonus over the past 12 months. In order to maintain some equality among the mechanics, a new base wage was established with March 26 as a projected completion date. To offset the fact that some individuals might experience a decrease in their wages, the board voted to pay the complete cost of the mechanics' uniforms. To offset the additional cost, Lowry also recommended a $4 increase in the price of their tuneups.[5]

[5] The 42d meeting of the board of directors of Mark I Tune-Up Centers, Inc., was held March 21, 1979, at 4:30 p.m. at the corporate offices, 8502 Manchester Road, Brentwood, Missouri. The following members of the board were present: Gary Lowry, Alan Miller, Douglas Neville, Edward Bock, and Albert O'Brien. Joseph Tully and Preston Estep were absent. The following topics were discussed:

Item 5. The progress of the Fairview Heights center over the last 7 months was discussed and compared to the center in St. Charles. Unit growth at Fairview has decreased drastically every month since September '78 and it is Gary Lowry's opinion that the center be closed. This decision was approved unanimously and Mr. Lowry was directed to try to sell the center first as an ongoing business concern and to report back to the board on any progress.

Item 6. A motion was made and approved that the company make a tender offer to purchase up to 1,000 shares of the company's common stock from any existing shareholder at a price of 50 cents per share. There are 18 shareholders owning less than 1,000 shares each, for a total of 6,971 shares. This offer is an attempt to reduce the number of smaller shareholders.

Item 7. Gary Lowry made a report on the meeting he and Alan Miller held with all the company's mechanics on February 14, 1979. He expressed worry over the complaints the mechanics had about the bonus plan. It seemed that this was the subject of 90 percent of the meeting. Mr. Lowry suggested that we change the bonus plan to straight hourly wages because it was apparent from the mechanics' meeting that most of them did not favor the present bonus plan, we offer, and instead would prefer the money paid in actual hourly wages. Mr. Lowry was sure that converting the bonus plan would result in a lower average ticket, however. To offset this, he suggested we raise our tuneup price $4 to be put into effect as soon as the advertising could be changed. The last price increase was June '78 and a raise was given to all employees at that time. The board voted unanimously to convert the bonus plan to straight wages based on the individual mechanic's average hourly bonus over the past 12 months. At the same time, to keep some equality among the mechanics, we should try to establish a new base wage. This conversion should be completed by the next pay period, March 26. To offset the fact that some individuals may actually have a small decrease in their hourly wages after the conversion figures are completed, the board also voted to begin paying the complete cost of the mechanics' uniforms. It was felt that this change in the pay system would result in an upgrading of the caliber of personnel we have working for us, reduce employee turnover, and increase productivity.

6. Respondent's preelection meetings

At the end of March, Schaeffer sought permission from management to address all the employees on behalf of Respondent. He felt his 7 years of experience with the Company provided him with insight which newer employees might lack. Lowry accepted his offer and instructed Kirt Carlson to assist him. The three men discussed the general topics and details as to how the information should be presented to the men.

There were six meetings beginning with Fairview Heights and South County on April 6, followed by Page and Ferguson on April 10, and then Manchester and St. Charles on April 12. Schaeffer was the primary speaker with Carlson adding a few statements or answering a few questions near the end of each program.

Schaeffer opened the meetings by stating:

> You know why we're here. There was more than 50 percent of the people in the company that signed cards stating that they were concerned and were interested in union representation. We are coming around because of that percentage of the cards.

The discussion would then turn to various topics, including the new pay structure as contrasted with the possible income under union contracts.[6] Schaeffer arqued:

> With a union salary, you know that you would have the union fees, dues every month, that you would have to pay and you can't guarantee exactly what salary the union will give you because you have to fit into a certain structure level, depending on your knowledge of the vehicle.

Schaeffer speculated that, if a union were selected as their representative, they would probably demand a wage increase over the recently increased wage schedule. Such an increase might result in an increase in the price of tuneups. Since this is a highly competitive industry the increased price might result in a decrease in business as customers search for cheaper work. Three of the centers were already floundering and further decrease in business might force Respondent to close one or two centers. Schaeffer denies that he said any store would definitely close if a union won the election.

In reviewing the employee benefits, he also pointed out if the Company was faced with additional cost they might lose shop privileges. They might not have the use of the facilities or be able to purchase parts at company cost.

Schaeffer insisted that his predictions were never stated as threats and were couched in terms such as "perhaps," "might," "may," "probably," or "possibly." Several witnesses agreed that neither Carlson nor Schaeffer spoke in absolute terms.

7. Election

The election was held at the Page facility on April 13. When Brier arrived he attempted to talk to Schaeffer

[6] The employees had been informed of Respondent's new policy concerning free uniforms and pay structure approximately a week before these meetings.

concerning his discharge and medical reports. Protte and Spiess were present during part of the conversation.

Schaeffer claims Brier opened the conversation by stating, "Hi, Don, I am here to vote yes." They then briefly reviewed his voting eligibility. As the conversation turned to the election, Schaeffer became very vociferous and excited. Brier described his statements as irrational. During his testimony, Schaeffer readily and candidly admitted he was quite upset and had responded "that I was not a union man, not a fan of the unions."

He related the basis for his antiunion sentiment. In 1976, he and eight other men were helping his father who was a sales manager for a trucking company. Late in the evening approximately 12 men surrounded their shop. The intruders beat and knocked one employee off a truck and then pulled guns and threatened their lives, including his mother and father. The men who were arrested for the assault were members of the Teamsters Union Local 618.

After Schaeffer completed relating this experience Brier replied, "Well, you were probably doing something wrong and they were probably putting you in the right frame of mind." Since his parents' lives had been threatened Schaeffer was particularly incensed by Brier's remarks. At this point, Protte had cast his ballot and told Schaeffer it would be good for the Company if the Union got in because the Union would be able to take care of personnel a lot better. Schaeffer responded:

> If the union comes in things could really change. I would not be the nice guy that I have tried to be in the past, helping the mechanics out. I could be extremely stern and tough and go completely by the books and rules. When people screw up I could really throw the books at them.

Both Protte and Brier also stated that Schaeffer threatened that their shop privileges would be rescinded if a union gained power.

8. Protte's discharge

David Protte was employed by Respondent on two occasions. His initial employment began in September 1975 when he was hired by Manager Jeff Harris to work as a mechanic at the Page facility. In the 3 years that followed he was transferred to South County, then back to Page, and finally to North County. In March 1978, he left that employment to work for the Missouri AAA's Diagnostic Clinic, where he was a member of the Teamsters Union, Local 618.

The first period of employment was interrupted in July 1977, when he was discharged by Schaeffer, the South County manager. Prior to the discharge he asked a few of his fellow employees if they were interested in joining a union for collective bargaining. Protte testified that Schaeffer told him they did not want a union shop at Mark I Tune-Up Centers. Since his attitude had deteriorated and he had become active in seeking a union he was discharged. When he asked for his job back, Lowry said, "I heard you were asking about union representation. I've heard you were talking about walkouts and strikes and we don't need that kind of troublemaking around here." After Protte assured him he would change his attitude he was rehired for the Page store.

Schaeffer denied that Protte was discharged for union activity. In fact, he claims he was unaware of any union activity on Protte's part in July 1977. The discharge at that time was based solely on his attitude. Although his work was good he would constantly make disparaging remarks toward Schaeffer and he was impossible to manage or control. It was only after Protte assured Lowry that his general work attitude would improve that he was taken back. Lowry and Schaeffer both deny that either this discharge or rehiring had anything to do with union activity.

After 11 months with AAA, Protte was discharged and he again turned to Respondent for a job in the early part of February. Lowry testified that he was extremely reluctant to rehire him because of the past experiences with him. He was very independent and refused to follow work rules. It was only after strong assurances by Protte that he had matured, was getting married and wanted another chance, that he was considered for the job. At this meeting Lowry explained that they anticipated that a mechanic would leave the Page Center and therefore he could work there as his replacement. Later he learned that Spiess was the individual who was expected to leave. Lowry testified that the anticipated vacancy was the planned departure of Spiess, whom Schaeffer wanted to discharge for unsatisfactory work performance. All agree that, when Protte was hired, management felt it was for a permanent position. However, near the end of February a decision was made not to discharge Spiess and thus Protte was no longer needed as his replacement. Although the Company decided against immediate discharge, it felt discharge was inevitable but held off on the decision for fear that such action would be tied to the union organization attempts and the election.

No one informed Protte that there was no longer an opening at the Page store. Schaeffer did approach him a week after he started and asked him if he would like to transfer to the Ferguson store to fill in for a vacationing mechanic. Schaeffer told him, "I don't know how long you would be up there. It might be a month or more. I wouldn't mind having you back." Protte then agreed to the transfer. There was no indication that he was scheduled for a discharge; on the contrary he was led to believe that the manager was pleased with his work and that he would return to the Page facility. Later when he started working at the North County store, the manager, Gary Lane, told him he was permanently assigned to the North County store and would not return to Page.

On March 5, Lowry called the Ferguson store and Protte answered the phone. According to Lowry's testimony the following conversation took place:

> LOWRY: Have you heard about the meeting tomorrow evening?
> PROTTE: What meeting?
> LOWRY: The union meeting.
> PROTTE: Oh, yeah.
> LOWRY: Are you going?
> PROTTE: Yes, I was planning to go.

LOWRY: How come?

PROTTE: I just want to hear what they have to say.

LOWRY: Well, after you go if you've got any questions, I would be glad to talk to you.

Lowry was surprised by his responses because he claims Protte had previously told him he did not like working for the Union at AAA.

Protte's testimony is in conflict with Lowry in two basic areas. He claims at the end of their conversation he suggested if he had any questions after the meeting he could feel free to call Lowry. The second basic conflict is in the omission of several statements attributed to Lowry. Protte's recollection of the conversation included the following:

LOWRY: I'd rather you didn't go.

PROTTE: Well, Gary, I hold a withdrawal card from Teamsters Local 618. I'm a member in good standing with the union and I'd rather keep it that way.

LOWRY: Well, we cannot afford a union. I'd rather you still didn't go.

On Tuesday, March 20, Gary Lane approached Protte at 2 p.m. and told him he was laid off due to lack of work.

Respondent placed an ad in the employment section of the Sunday St. Louis Post Dispatch on April 22 for a mechanic at their South County store.[7] On the following day, Protte called Lowry and asked him if he had been laid off or terminated. For the first time he was told that he had been terminated and that he had been hired only as an extra man. Protte then confronted him with the ad and asked for the job. Lowry repeated he was terminated because of certain problems and they were not hiring even though they had run an ad for a mechanic's position.

MARK I
TUNE-UP CENTERS, INC.
Equal Opportunity Employer

9. Spiess' discharge

Robert Spiess was employed as a mechanic from March 1978 until either June or July 1978, when he was promoted to the position of second-shift supervisor (night supervisor). According to Lowry his new duties included all "that the manager would have, supervised the schedule there in the evening, assign the cars as they came in, handle any customer problems that came up, supervise the employees under him, send people home early if there was no work, make sure the deposit was done right by the receptionist and it go in the bank." Spiess did not agree with these observations. He did not have authority to hire, fire, discipline, grant time off, evaluate employees, set work schedules, promote, or give raises. The authority remained with the manager. Although as a supervisor he expected to receive a raise, his income remained at $3.50 per hour until he received an automatic 6-month raise to $4.16. Finally, after he had been a supervisor 4 or 5 months, his hourly wage was increased to $4.50. When the bonus plan was discontinued in the latter part of March, all employees received a raise. Schaeffer informed him that: "Everyone was getting a raise so yours will be $5.91 an hour and the reason is that Gary realizes he has been making mistakes."

Although Spiess was promoted to night supervisor, Schaeffer claimed he was a poor employee, due to his general attitude. His mechanical skills were outstanding; however, his work habits were very poor. On numerous occasions he was late, his personality resulted in conflict with customers and fellow employees. Schaeffer testified that he decided to discharge him prior to February 22, but decided to delay the termination to avoid any appearance that the termination was in any way connected to union activity. In the interim, Spiess continued to cause problems. However, on March 9, Scheaffer gave him an unscheduled bonus of $30, which was allegedly for additional and difficult mechanical work that he had performed. Spiess testified he did not know why he received the $30 and denied that his quality or quantity of work changed in such a way as to justify this bonus. On March 20, he failed to come to work with an excuse that he was ill when, in fact, he was not. He denied Schaeffer's allegation that he spoke disparaging words toward black customers. On April 23, he was discharged and handed a document which purported to list his shortcomings:

1. Took off a day and wasn't sick on a Tuesday in early April.
2. Shunned supervisory position on vote day, but still signed time cards and handled other supervisory situations.
3. Late for work—7 times in last 3 weeks, 3 times last week alone
4. Doesn't want to fit into overall of shops scheme of things.
5. Bad attitude, negative attitude, down grades shop situations rapidly, chip on shoulder.
6. Cut down customers, especially blacks.
7. Been given chances to change in past.

Spiess admitted having one argument with a customer who refused to pay, but he denies ever insulting a black customer.

[7] The ad read:

AUTO MECHANIC

We are a young, dynamic company with a reputation for excellence in the tune-up field. The company's growth has created openings at our Concord Village Center for Mechanic with neat appearance, ambition, experience or school training and their own tools. Familiarity with scope and infra-red equipment is preferred. We offer good wages and benefits pleasant working environment and a career path into management. If you're tired of working at a service station or general repair garage and want to concentrate your skills on engine diagnosis and tune-up, come and talk to us on Tuesday, April 24, between 8:30 & 12:00 at our Corporate Office. 8502 Manchester Rd. in Brentwood.

10. Hanner's incident

On March 1, Brier gave Hanner a Teamsters authorization card which he signed. Since Hanner was having mechanical trouble with his car they agreed to drive together to the March 7 meeting. On the evening of March 6, Hanner told him he had changed his mind and he no longer intended to attend the meeting or support the Union. Brier claims that Hanner explained he was experiencing financial problems and Lowry agreed to arrange for a loan for him if he would stay away from the union meeting and vote against the Union. Hanner warned him if he repeated his comments he would deny them.

A few days later, Protte told Hanner that Local 618 had a credit union which would lend him money if he were in financial trouble. He said he would consider that offer as a possibility but it was too early to determine the extent of his financial needs. He concluded the conversation by stating, "If it gets bad enough that I'm going to lose my kid, I'll do anything to keep from losing my kid."

At the hearing, Hanner verified the two conversations; however, he denied that he ever told Brier that Lowry offered him a loan. This particular period of his life was very stressful and difficult since he was in midst of a divorce. It was unclear what the litigation would cost him but he knew his debts were rapidly increasing. Although he did not receive a loan from Lowry or from Respondent, he did sell his stock back to the Company for approximately $1,100.

On cross-examination, Hanner stated that on numerous occasions Lowry had asked him questions concerning the union drive. Lowry wanted to know who was behind the organizational campaign and "they would handle the rest." He told him that he thought Brier and Protte were doing the footwork.

The Union offered him very little since he had seniority and was the top paid mechanic. In addition, he expressed a fear that if he actively supported the Union he could lose his job. This possibility was totally unacceptable to him since he did not wish to risk even the possibility of losing his son, through some financial misfortune. Although he signed an authorization card he was not in favor of the Union. He explained he felt signing the card simply provided the Union with an opportunity to explain what it could do for the men.

B. *Analysis*

1. Interrogations

The fact that a telephone conversation occurred between Lowry and Protte on March 5 or 6 is not in dispute. The General Counsel argues that Lowry's statements and questions during that conversation were of a coercive nature and therefore were an unfair labor practice prohibited by Section 8(a)(1) of the Act.[8]

Protte related that when he answered the telephone Lowry said, "I heard you had a union meeting going. I'd rather you didn't go." After Protte explained that he had a withdrawal card from Teamsters Local 618 and that he wanted to maintain his good standing with the Union, Lowry commented, "Well, we cannot afford a union." The conversation ended when Protte explained: "Well, I'm going to go and hear what they have to say, make my own decisions and I guess if I have any questions, I can feel free to call you." Lowry acknowledged, "Yes, that's right."

Respondent is careful to point out that Lowry called the Ferguson Center to talk to Gary Lane, the manager, when Protte picked up the receiver. In a rather casual manner he asked if he had heard about the meeting which was scheduled for the following evening. Initially, Protte responded, "What meeting?" Lowry answered, "The union meeting . . . are you going?" When he received an affirmative answer Lowry testified he was surprised because, when Protte had left AAA and returned to Respondent, he had said he did not like working for a union. Lowry then asked to speak to Gary Lane after he stated, "Well, after you go if you've got any questions I would be glad to talk to you."

Whether this conversation should be considered coercive depends in large part on the credibility of the various witnesses. With regard to the disputed portions of the testimony, I do not credit Lowry's version of the facts, since it appears to have been designed to strengthen Respondent's defense and to delete or minimize those comments which are clearly coercive.

The General Counsel argues that this brief conversation represented coercive interrogation. The first analysis of Lowry's questions leads one to believe they were isolated, innocent, and spontaneous inquiries. After all, the phone call was directed to Lane and it was only by mere chance that Protte answered the call. However, in order to evaluate fully an interrogation's tendency to coerce, it is necessary to examine all of the surrounding circumstances. Actual coercion is not necessary but, rather, the true test is whether the questioning tends to be coercive. *Cagles's, Inc.* v. *N.L.R.B.*, 588 F.2d 943 (5th Cir. 1979), enfg. 234 NLRB 1148 (1978); *Sturgis Newport Business Forms, Inc.* v. *N.L.R.B.*, 563 F.2d 1252 (5th Cir. 1977). The Board has held that, where the interrogation is isolated and occurs in an atmosphere free of coercive conduct, the questioning is not *per se* unlawful. *Alley Construction Co., Inc.*, 210 NLRB 999 (1974). Certainly, in the present case the questions appear to be spontaneous and harmless, until all of the surrounding facts are considered. Protte's past experience provided him with a clear understanding as to Lowry's and Schaeffer's dislike for unions. Prior to July 1977, Protte had asked some of his fellow employees if they were interested in joining a union for the purpose of collective bargaining. Shortly thereafter, Schaeffer discharged him and told him they did not want a union shop at Mark I Tune-Up.[9] A week later, Protte asked Lowry for his job back and he said, "I heard you were talking about union representation. I've heard you were talking about walkouts and strikes and we don't need that kind of troublemaking around here." It was not until Protte assured management that his "attitude" had changed that he was rehired. Under these circumstances it is easy to understand why Protte

[8] I credit Protte and not Lowry concerning their conversation.

[9] I do not credit Schaeffer's testimony regarding Protte's discharge in July 1977.

assured Lowry that he did not like working for AAA because it was a union shop. Lowry admitted he hesitated to rehire him after he left AAA because he had been very "independent." Obviously, the key to reemployment for Protte was the simple utterance of antiunion sentiment.

It is interesting to note that Protte's immediate answer to Lowry's inquiry concerning the "meeting tomorrow evening" was "What meeting?" It is clear from the testimony that Protte signed a union authorization card on March 1 and was well aware that a union meeting was scheduled for March 7. Why then did he initially act as though he lacked knowledge of the pending union meeting? Again his past experience forewarned him of Lowry's union animosity and the importance of avoiding even the appearance of being a union activist. He had every reason to believe that Respondent wanted to remain nonunion. Lowry did not reveal the purpose of his questions and there is no basis for inferring that Protte could have perceived a legitimate basis for the questions. *San Lorenzo Lumber Company*, 238 NLRB 1421 (1978). Further, there were no assurances that the employee's response would not lead to a reprisal. *N.L.R.B.* v. *Super Toys, Inc.*, 458 F.2d 180, 183 (9th Cir. 1972). Generally, any interrogation by the employer relating to union activities contains the potential danger of coercing the employees. *Texas Industries, Inc.* v. *N.L.R.B.*, 336 F.2d 128, 133 (5th Cir. 1964). Obviously, company questions regarding union sympathy, affiliations, organization, or activity have a natural tendency to instill fear of discrimination in the minds of employees. This can be true even when the questions are not uttered in the context of threats or promises. *Paceco, a Division of Fruehauf Corporation*, 237 NLRB 399 (1978). Clearly, Lowry's question was perceived by Protte as fraught with the danger of coercion. The fact that he acted as though he did not know what meeting only emphasizes his natural fear concerning such inquiries. *N.L.R.B.* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1028 (6th Cir. 1974).

Therefore, I find that Respondent's interrogations through Lowry were coercive and constituted unfair labor practices in violation of Section 8(a)(1) of the Act.

2. Threats

During his testimony, Schaeffer related a personal experience with members of Teamsters Local 618 in 1976. He was assisting his father who was a sales manager for a trucking company when 12 men surrounded the shop. They proceeded to threaten them with guns and actually beat up one man and threw him from a truck. The lives of his mother and father were threatened. Schaeffer candidly admitted that based on this personal experience he was neither a fan nor a union man. He volunteered to speak to the employees to provide them with management's views.

There is little disagreement as to the substantive issues raised by Schaeffer. Some heard his remarks as dogmatic predictions of the future, while others noted each prediction was couched in terms of "perhaps or maybe." In general, Schaeffer argued at the preelection meetings and on the day of the election that if a union were selected as their union representative they may face the following problems: (1) closure of Respondent's facilities; (2) loss of the use of the Company's facilities to repair their own cars and the privilege of buying parts at cost; and (3) imposition of more onerous working conditions.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-620 (1969), the Supreme Court drew the line between permissible predictions and unlawful threats as follows:

> . . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in a case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d 157, 160.

Clearly, Respondent has the right to present its views concerning the Union and the pending election. The question is whether those views are presented in such a manner as to threaten reprisals or to promise benefits. In the present case the credible evidence reveals that union animus on the part of Lowry and Schaeffer was considerable. The employees were aware of Respondent's general animosity toward unions. The fact that Schaeffer carefully couched his predictions in terms of "maybe and perhaps" does not lessen the threatening qualities of his statements. Other than casual reference to the fact that increased wages might result in higher charges and fewer customers, Respondent failed to show such dire predictions were based on objective facts which would demonstrate probable consequences beyond its control.

Schaeffer's predictions were illegal threats. He was not provided with any actual accounting by Respondent which would substantiate his predictions. Indeed, he was not even aware that the board of directors had decided to close one of the facilities. His predictions were in the abstract and lacked the weight of actual facts and figures needed to project the success or failure of any business venture. Undoubtedly Schaeffer was sincere; however, his predictions were focused more on his personal an-

tiunion emotions than on the cold hard facts required of business realities.

The Board has frequently found that a threat of closure is a violation of Section 8(a)(1) of the Act. *Fry Foods, Inc.*, 241 NLRB 76 (1979); *Gilliam Candy Co., Inc.*, 239 NLRB 991 (1979). Schaeffer repeatedly asserted that the presence of a union might result in the closure of a store. His admonition that they might no longer be able to purchase parts at cost or use the Respondent's utilities, tools, and facilities is also a violation of the Act. *N.L.R.B.* v. *Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1979), enfg. 236 NLRB 1700 (1978); *St. Vincent's Hospital*, 244 NLRB 84 (1979). Schaeffer's comment that he can be strict and tough and that the company rules might be enforced more strictly is a threat to change to more onerous working conditions in violation of the Act. *Robert E. Anderson and Richard E. Anderson, Co-Partners d/b/a Anderson Cabinets*, 241 NLRB 513 (1979).

3. Benefits

The General Counsel argues that Respondent illegally provided three economic benefits to induce the employees to vote against the Union. These benefits consisted of an unscheduled $30 bonus given to Spiess, conversion of the past bonus and wage plan to a straight hourly wage, and agreement for Respondent to pay for the required uniforms. In *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the Supreme Court held:

> The broad purpose of §8(a)(1) is to establish "the right of employees to organize for mutual aid without employer interference." *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 798. We have no doubt that it prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.

Such intrusions can undermine the Union's majority support and thus interfere with the lawful collective-bargaining rights which are protected by Section 7 of the Act. *Jefferson National Bank*, 240 NLRB 1057 (1979); *East Belden Corporation*, 239 NLRB 776 (1978). Therefore, the question which must be answered whenever benefits are given prior to an election is simply: What were the motivations guiding the employer's actions?

The Board has long held that granting of benefits during an election campaign is not *per se* unlawful where the employer can show that its actions were governed by factors other than the pending election. *American Sunroof Corporation, et al.*, 248 NLRB 748 (1980); *Centralia Fireside Health, Inc. d/b/a The Fireside House of Centralia*, 233 NLRB 139 (1977). This burden can be met by the employer by showing that the benefits which were granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union. *Pan American Optical Company, Inc.*, 211 NLRB 50 (1974). In *The May Department Stores Company, d/b/a Famous-Barr Company*, 174 NLRB 770 (1969), the Board held that an employer who was confronted by a union campaign should decide whether to grant or withhold benefits as if the union were not in the picture.

The fact that Respondent's board of directors addressed itself to the revision of the then-existing bonus and wage plan prior to the beginning of union activity is undisputed. The initial union meeting was held on February 27 and Respondent was notified on March 6 that the Teamsters Union had signed union authorization cards from a majority of their employees. On January 30, the directors met at the regularly scheduled meeting. At that meeting, Lowry explained that he had received complaints from both managers and regular employees that the bonus wage policy was unfair. The directors instructed him to meet with the employees and ask them for their views and suggestions. On the following day he notified the employees that a meeting was scheduled for all employees except managers, on February 14. At the meeting the men expressed displeasure not only with the wage and bonus policy but also with the uniform policy. They felt that since Respondent required uniforms they should pay for them. Al Miller, a member of the board of directors, was present along with Lowry. They explained that they could not make firm commitments because the Company's resources were limited. However, they assured the men that the subject would be discussed at the next board of directors meeting. Lowry reported to the directors at the next regularly scheduled meeting on March 21. The board voted to revise the pay schedule by eliminating the bonus and by increasing the hourly wage.

The increase in the hourly wage was intended to equal roughly the average bonus received by each employee during the previous 12 months, plus his former hourly wage. The revision resulted in an increase for some and a decrease for others. There was no evidence offered which would indicate that the increases or decreases were connected in any manner to the individual employee's union activity. For example, Hanner had expressed antiunion sentiment and his new wage was less than his former income under the old bonus and wage policy, while Daugherty had supported the Union and his income was greater than his former income based on the old bonus and wage policy. Lowry explained that under the new plan a few employees would have received disproportionately high hourly wages. In an effort to have greater uniformity the excessively high wages were lowered to conform with the general pay schedule; e.g., Hanner. The directors also voted to pay for all uniforms; it was believed that this would offset any loss an employee might sustain under the new system.

It is questionable whether the revised pay schedule can be classified as an increase in benefits. Certainly, the intent was to convert the old bonus wage system to a straight hourly wage. The new wage reflected the average old bonus plus the old hourly wage. Presumably, under such a conversion the employee would receive about the same annual income. Under such a revision and increase it is questionable that the revision would have the effect "of impinging upon their freedom of

choice for or against unionization." *N.L.R.B.* v. *Exchange Parts Co., supra.*

Even if this revision is properly classified as a wage increase, the preponderance of credible evidence indicated that it was not given in violation of Section 8(a)(1). It is an undisputed fact that the board of directors proceeded in an orderly fashion to revise the hourly wage before they were aware of the union activity. The ultimate revision was part of an already established policy which was not affected by the advent of the Union. In sum, it is clear that Respondent granted the wage revision and agreed to pay for the uniforms for reasons unrelated to the union activity and it lawfully announced those changes in the normal course of business. Therefore, I find that Respondent did not violate Section 8(a)(1) in respect to the wage revision and the agreement to pay for the uniforms.

The remaining "benefit" question to be resolved is whether the undisputed $30 check given to Spiess by Schaeffer represented a bonus for some additional and/or difficult work. Spiess testified he was puzzled by the check since he felt his work had not changed in either quantity or quality. It is interesting to note that the $30 was given in the same general time period when Schaeffer asserted he was considering discharging Spiess for his poor attitude. The bonus was not only unscheduled but also was unprecedented. The fact can only lead to the conclusion that management was attempting to influence Spiess' vote in the coming election. I find this $30 bonus was given in violation of Section 8(a)(1).

4. Loan to Hanner

Although Hanner may have told Brier that Lowry offered him a loan or assistance in obtaining a loan there is a lack of sufficient evidence to substantiate this allegation. Indeed, the principals to this alleged loan, Hanner and Lowry, both convincingly deny that they ever, even in the slightest degree, discussed a possible loan. The General Counsel argues that, even if the evidence fails to prove he obtained a loan, a violation of Section 8(a)(1) must be found based on an offering of a monetary incentive in return for his forgoing any union activity. This monetary incentive is based on the fact that, in March, Hanner received the largest bonus of any employee and/or the fact that Respondent purchased 2,300 shares of its stock from Hanner.

The General Counsel bases his monetary incentive argument on the fact that Hanner testified that he received about $400 in March and he felt this was the largest bonus paid to any employee. There was no foundation presented which would indicate that Hanner had any direct knowledge as to who received the largest bonus. He freely admitted he did not know many of the employees at the various stores. He even guessed at the amount of his bonus. The undisputed fact was the method used by Respondent to determine a bonus. All employees received a bonus calculated by the same formula which reflected the amount of parts that each employee sold. There was absolutely no evidence offered that would prove that Hanner's bonus was determined by any method which would reflect a "pay-off" or favoritism.

It is true that the March 21 minutes of the board of directors reflect that the following motion was made and approved:

> . . . that the Company make a tender offer to purchase up to 1,000 shares of the Company's common stock from any existing shareholder at a price of 50 cents per share. There are 18 shareholders owning less than 1,000 shares each, for a total of 6,971 shares. This offer is an attempt to reduce the number of smaller shareholders.

I fail to see such great significance in the fact that the Company purchased 2,300 shares instead of 1,000 shares. The motion was an attempt to reduce the number of small shareholders. The price offer was 50 cents per share. Hanner was not given a larger amount per share which would reflect disparate treatment.

After reviewing the evidence and considering the General Counsel's arguments, I have concluded that there is a lack of convincing evidence which would allow one to draw the inference that Respondent violated Section 8(a)(1) of the Act by: (1) arranging for a loan; (2) providing a loan; (3) purchasing 2,300 shares; and/or (4) paying a bonus to Hanner in March.

Therefore, I shall find and recommend that the charges contained in paragraph 5(c) of the complaint be dismissed for a lack of conclusive and sufficient evidence to substantiate the charge.

Hanner's testimony does raise an unanswered question. Why did his attitude toward the Union change so dramatically between March 1, when he signed the Teamsters Union authorization card, and March 6, when he informed Brier he would not support the Union or attend its March 7 meeting? I do not credit Hanner's assertion that he never favored the Union and that he signed the card only to allow the Union an opportunity to present its views to the employees as to what it had to offer. If this were true, why did he not attend the meeting to hear the Union's presentation? On cross-examination, he admitted reading the authorization card before he signed it. The General Counsel is correct when he argued that some event occurred which was responsible for Hanner's decision not to attend the union meeting.

Why did Hanner change his support for the Union? The answer was clearly provided in his testimony. Unfortunately, he was in the midst of a divorce and feared the loss of his son. He stated, "I was going to do nothing that was going to cause me to lose my job because if that were the case I would certainly lose my only son and that was my concern." On cross-examination he was asked and answered as follows:

> Q. During your testimony you expressed some concern about your job had you supported the union. Did you feel that way?
>
> A. Yes, I was concerned about my job in a lot of ways. I have got time with the company.

Perhaps once or twice a week, Lowry quizzed Hanner concerning union activity. During these discussions Lowry wanted to know "who was doing it, who was in-

volved, who was doing the foot work and I [Hanner] was expressly told, from there that they would handle the rest. They were just concerned with who they were dealing with." In answer to these inquiries he informed management that both Brier and Protte were involved.

Lowry's interrogation had the desired effect of coercing Hanner to withdraw his support and cease all union activities, as well as maintaining surveillance on the union activities of others.

Although there is insufficient evidence to support the proposition that Hanner received a loan from Respondent, there is ample proof that he was coerced into maintaining surveillance and informing on the union activities of his fellow employees. Such coercion is a clear violation of Section 8(a)(1) of the Act. The General Counsel did not amend the complaint to include these charges, but they were fully litigated. Lowry testified after Hanner had an opportunity to deny interrogating and using Hanner for surveillance. He not only did not deny the statements but he also admitted that some of his knowledge of union activity came from Hanner.

In *Alexander Dawson, Inc. d/b/a Alexander's Restaurant*, 228 NLRB 165 (1977), the complaint did not specifically allege surveillance as a violation of the Act and it was not amended to allege such violations, but the Board found an 8(a)(1) violation since the allegation was sufficiently related to the subject matter of the complaint to warrant specific finding of a violation and the facts were fully litigated at the hearing, and the employer had the opportunity to offer evidence on the point. After considering all the surrounding circumstances, I find that Lowry's interrogation of Hanner and his using him for surveillance were coercive and produced an atmosphere which interfered with the employee's union activities in violation of Section 8(a)(1).

5. Discharge of employees

During Lowry's interrogation of Hanner, he assured him that all he wanted to know was who was doing the footwork and leading the union organization. When Hanner named Brier and Protte as two of the union activists, Lowry expressly told him that "they would handle the rest." Indeed, in a short time, this prophecy became reality:

George Brier discharged	March 26, 1979
David Protte discharged	April 23, 1979
Robert Spiess discharged	April 23, 1979

Lowry did "handle the rest" by discharging the three most active unionists among his employees. I find the various justifications by Respondent to be pretextual and the three discharges in violation of Section 8(a)(1) and (3) of the Act.

a. *George Brier*

During his 5-1/2 years of employment for Respondent, Brier worked both as a mechanic and a store manager. While in the capacity of a manager he had an opportunity to observe the company sick leave policy in action. The policy simply required that the individual should keep the Company informed as to the status of the illness or injury. A written medical report was required if the problem was of an extended duration. Apparently even this rather informal policy was enforced in a lax manner. He related the case of Richard Twardawski who had injured his back in 1978. Several times Twardawski's doctor released him to return to work; however, each time he would report several days late. He was not discharged until the second or third failure to report.

Respondent argued that they relied on Dr. Barrale's medical reports to determine when they could expect Brier to return to work. The letter of February 28, stated, in part:

> At this time Mr. Brier should be able to return to work on approximately March 19, 1979. We will confirm this return date after Mr. Brier has been treated for approximately two more weeks.
>
> If you have any questions about the patient's condition, please feel free to call.

Lowry denied receiving Dr. Barrale's letters of March 16 and 27, which extend Brier's sick leave to April 2 and 16, respectively. Brier testified in a clear and convincing manner. I credit his assertions that he personally mailed the letters of March 16 and 27 to Lowry in Dr. Barrale's envelopes by depositing them in the mailbox at St. Ann Post Office, with the proper address. When he was told that they had not been received he requested the post office to search for the letters. He also checked with his doctor's office to see if they had been returned there. The search was futile.

As a general proposition, proof of mailing of a letter properly addressed and stamped raises a rebuttable presumption that it was received. *Ahonen Lumber Company*, 77 NLRB 706 (1948); *Legille* v. *Dann*, 544 F.2d 1 (D.C. Cir. 1976). Should a party present evidence tending to show nonreceipt, a question is presented for the trier of fact. *Columbia Finance Company* v. *Worthy*, 141 A.2d 185 (App. 1958). In *Thiele Tanning Company*, 128 NLRB 19, fn. 3 (1960), the Board concluded that a general denial does not overcome the presumption. In the present case I have credited Brier's testimony and I find that all of the letters were received by Respondent.

Respondent never argued that Brier's work was inadequate. The discharge was allegedly based solely on the fact that he did not return to work on March 19. Even if one assumes that Lowry did not receive the letters of March 16 and 27 the discharge remains very suspect. Brier had a good work record for 5-1/2 years. He followed the procedure for sick leave by forwarding medical reports. By his own admission Lowry had received the medical reports of January 12 and February 6, 17, and 28. The letters invited inquiries as to his medical condition. A pattern had been set by Dr. Barrale of providing an *approximate* return-to-work date, with the additional comment: "We will confirm this return date after Mr. Brier has been treated for approximately two more weeks." Lowry made no effort to contact Dr. Barrale's office or Brier to find out why he failed to report

to work. If the only reason for discharging Brier was his failure to appear on March 19 then the entire matter should have been clarified when Lowry received Dr. Barrale's letter of April 11. Since Lowry did not reinstate him to sick leave status after the receipt of the April 11 letter, an additional reason for the discharge must exist. The only other possible reason for the discharge is that Respondent demonstrated conduct of union animus. Hanner had specifically informed Lowry that Brier was a union activist. At that point his job was in jeopardy. Respondent's stated reason for discharge was clearly pretextual. I find that George Brier was discharged for his union activities in violation of Section 8(a)(1) and (3) of the Act.

b. *David Protte*

Respondent argues the sole reason for Protte's discharge was based on the fact that he was originally hired to take Spiess' job, who was scheduled to be terminated. When management decided to retain Spiess there was no further need for Protte's services. The total evidence does not substantiate these contentions.

Respondent had earlier terminated Protte for his union activities in July 1977. At that time he had asked his fellow employees if they were interested in joining a union. Schaeffer told him they did not want a union shop at Mark I Tune-Up Center. A week later when he asked for his job Lowry said, "I heard you were talking about union representation. I've heard you were talking about walkouts and strikes and we don't need that kind of troublemaking around here." Protte was rehired only after he assured him his attitude had changed.

Later Lowry was faced with the problem of rehiring Protte after he left AAA. Lowry testified that he hesitated to take him back because of his past independence. Again Protte was rehired after he assured him that he had matured and was happy to leave his last job because it was a union shop. On March 5, Lowry spoke to Protte on the telephone. At that time Lowry asked him about the upcoming union meeting. I have credited Protte's recollection of this conversation. Lowry told him he did not want him to attend the meeting. At approximately the same time Hanner told Lowry that Protte was one of the union organizers.

Respondent's argument is weakened by several events. If Protte were hired to fill Spiess' position why was he not retained when Spiess was fired on April 23? Protte was considered an excellent mechanic. If he were not retained in the Spiess position why was he not hired for the vacancy at the Concord Village Center? Respondent had advertised on April 22 that such a position was available.[10] Lowry's contention that Respondent placed the ad to build up a reserve of potential employees and not to hire a mechanic immediately is difficult to believe.

I find that Protte was laid off on March 20, and illegally discharged on April 23. The reasons provided by Respondent are pretextual. The sole reason for Protte's discharge was based on his union and other concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

[10] See fn. 7.

c. *Robert Spiess*

Respondent contends that they encountered problems with Spiess prior to January 1979. Although he was described as an outstanding mechanic his work habits and his general attitude were extremely poor. Schaeffer decided to discharge him prior to February 22, but then changed his mind because Spiess was an outstanding mechanic and management feared such a move would be perceived as retaliation for his union activities. The record is unclear as to when Schaeffer decided not to fire Spiess. Schaeffer did testify that he again decided to terminate Spiess in the latter part of March after he had failed to come to work, with the excuse of illness when, in fact, he was not sick. Even after this final decision, termination did not occur until after the election. Schaeffer explained he felt an earlier discharge would be misunderstood as retaliation for Spiess' union activities.

The credible evidence leads me to believe that Spiess was far less than an ideal employee. He admitted that he was often late and took a sick day when he was not actually ill. Apparently, he had insulted a black customer and in general he displayed an unacceptable attitude toward his employer and his fellow employees. However, all of these shortcomings were either ignored or condoned by Respondent's failure to discipline him at an earlier period. In 1978, he was promoted to second-shift supervisor. In 1979 he was given a $30 bonus. Schaeffer contends they put up with his unacceptable conduct because he was an outstanding mechanic. Whether he was classified as a good or bad employee, it is clear that neither his attitude nor work habits changed prior to his termination. The only visible change was his activity during the period of union organization.

I find that although Spiess may have been a poor employee the predominant reason for his discharge was based on his union activities and therefore was in violation of Section 8(a)(1) and (3) of the Act.

6. Representation proceedings

The Teamsters Union and the Machinists Union filed joint objections to the elections of April 13 and 16, 1979. The Regional Director for Region 14 issued a Report on Objections and Recommendations and order directing hearing and order consolidating cases on May 14, 1979, wherein he concluded that Objections 1, 2, 3, 5, 7, and "other Acts and Conduct" as to Parts A and B raised substantial material issues with respect to conduct affecting the results of the elections.

I have found that Respondent through Lowry, its president, and/or Schaeffer, a store manager, did, in fact, interrogate employees concerning union activities; threaten employees with the closure of a service center, more onerous working conditions, and loss of benefits; provided an unscheduled $30 benefit; and discharged three employees, Spiess, Protte, and Brier, in violation of Section 8(a)(1) and (3) of the Act. Generally, the Board has held that "conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786 (1962). In a recent case, *Super Thrift Markets, Inc. t/a Enola Super Thrift*,

233 NLRB 409 (1977), the Board noted, "The only recognized exception to this policy is where the violations are such that it is virtually impossible to conclude that they could have affected the results of the election." In the present case, I find such an exception does not apply since Respondent's conduct could have affected the results of the election. Therefore, I conclude that Respondent's illegal conduct tended to restrain the free choice of its employees and a second election by secret ballot should be directed at such time as the Regional Director deems appropriate.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's unfair labor practices occurring in connection with its operations set forth in section III, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Mark I Tune-Up Centers, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Teamsters Union and the Machinists Union are labor organizations within the meaning of Section 2(5) of the Act.

3. By the following conduct Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act:

(a) Coercively interrogating employees regarding union organization, leaders, membership, and activities.

(b) Threatening employees with possible closure of a service center and loss of employment if the Union becomes their bargaining representative.

(c) Threatening employees with a decrease in benefits and an increase in onerous working conditions if the Union becomes their bargaining representative.

(d) Asking employees to refrain from supporting the Union and to avoid their meetings.

(e) Giving an unscheduled and unearned bonus to discourage union activity.

(f) Soliciting an employee to maintain a surveillance of other employees' union membership and activities.

4. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged its employees George Brier, Robert Spiess, and David Protte and by failing and refusing thereafter to reinstate them because said employees engaged in activities for and on behalf of the Union.

THE REMEDY

Having found that Respondent committed numerous unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, as enumerated above, my recommended Order will require Respondent to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It will also be recommended that the election conducted on April 13 and 16, 1979, in Case 14-RC-8873 be set aside and that the matter be remanded to the Regional Director for Region 14, for the purpose of conducting another election at such time and place he deems circumstances permit the free choice of a bargaining representative.

Based upon the foregoing findings of fact, conclusions of law, the entire record in the matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Mark I Tune-Up Centers, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees regarding union organization, its leaders, membership, and activities.

(b) Threatening employees with possible closure of service centers and loss of employment if the Union becomes their bargaining representative.

(c) Threatening employees with a decrease in benefits and an increase in onerous working conditions if the Union becomes their bargaining representative.

(d) Asking employees to refrain from supporting the Union and to avoid its meetings.

(e) Giving unscheduled and unearned bonuses to discourage union activity.

(f) Soliciting employees to maintain a surveillance of other employees' union membership and activities.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer George Brier, Robert Spiess, and David Protte immediate and full reinstatement to their former positions of employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that they had been performing, or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay or other benefits. Backpay for George Brier, Robert Spiess, and David Protte shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be paid on the amounts owing and to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its headquarters at 8502 Manchester Road, St. Louis, Missouri, and at each of its eight facilities located in the St. Louis and St. Charles Counties, Missouri and Fairview Heights, Illinois, the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, in and about work areas and other areas as indicated above, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on April 13 and 16, 1979, in Case 14-RC-8873 be, and it hereby is, set aside and that case is hereby remanded to the Regional Director for Region 14 for the purpose of scheduling and conducting another election at such time that he deems circumstances permit the free choice on the issue of representation.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to all allegations of unfair labor practices not herein found to have occurred.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

Section 7 of the Act gives all employees these rights:

To organize themselves
To form, join, or support unions
To bargain as a group through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT coercively interrogate employees regarding union organization, leaders, membership, or activities.

WE WILL NOT threaten employees with possible closure of service centers or loss of employment if the Union becomes their bargaining representative.

WE WILL NOT threaten employees with a decrease in benefits and an increase in onerous working conditions if the Union becomes their bargaining representative.

WE WILL NOT ask employees to refrain from supporting the Unions nor to avoid attending their meetings.

WE WILL NOT give unscheduled and unearned bonuses to discourage union activity.

WE WILL NOT solicit employees to maintain a surveillance of other employees' union membership and activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer to reinstate immediately George Brier, David Protte, and Robert Spiess to their former jobs or, if those jobs no longer exist, to similar jobs, without loss of seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of their terminations on March 26, 1979, and April 23, 1979, together with interest thereon.

Our employees are free to engage in union activity on behalf of any labor organization or to engage in other concerted activity for their mutual aid or protection or not to do any of these things.

MARK I TUNE-UP CENTERS, INC.